IN THE

Supreme Court of the United States

October Term, 1922.

No. ———

JAMES C. DAVIS, AGENT OF THE PRESIDENT, UNDER SECTION 206 OF THE TRANSPORTATION ACT, 1920,

Petitioner,

vs.

JOHN O'HARA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Supreme Court of the United States:

James C. Davis, Agent of the President under Section 206 of the Transportation Act, 1920, in support of this, his petition for a writ of certiorari to be directed to the Supreme Court of the State of Nebraska to review a decree of judgment, rendered on the 21st day of February, 1923, which affirmed the judgment of the District Court of Douglyas County, Nebraska, entered on the 5th day of June, 1922, upon the verdict of a jury, for $46,840.11, upon the condition that all in excess of $37,500.00 be remitted, which was done, respectfully shows:

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I.

That this action was brought by John O'Hara, respondent, under the Federal Employer's Liability Act, February 9, 1920, during the federal control of railroads, in the District Court of Douglas County, Nebraska, against Walker D. Hines, Director General of Railroads, to recover damages for the loss of respondent's eyesight, which was totally destroyed September 13, 1919, by the explosion of an electric blasting cap. The pretended cause of action, upon which the suit is based, arose out of the operation by the President of the railroad of Union Pacific Railroad Company, under the Federal Control Act. The respondent claims that the Director General was engaged in interstate commerce; that he was employed by him in such commerce when injured; that his injuries resulted from the negligence of the employes of the Director General, and that, therefore, he is entitled to recover damages under the above Act, as appears from his amended petition, in which he alleged in substance:

That the respondent was employed by the Director General in the operation of a gantry, which was maintained and used by the Director General for transferring interstate shipments from one car to another. That on September 13, 1919, the respondent and other employes were making a sling out of a wire cable, to be used in transferring a car of poles, and that they were engaged in wrapping the cable with cloth so as to protect the employes from injury by the jagged ends of the cable. That they needed wire with which to tie the cloth to the cable, but that the Director General had neglected to provide it, and that "the foreman directed his subordinates to procure wire to complete said work." That thereupon one of the employes sought and found a piece of wire in an empty coal car and "brought it to said foreman, who accepted same and directed its use by its subordinates without carefully examining the same and neglecting to see and note its dangerous condition." That the employes

"undertook to use said wire for said purposes which wire had been retained and while the foreman and one of the defendant's employes aforesaid were using part of said wire binding said cloth upon said cable ends this plaintiff undertook to straighten and prepare the small remaining portion of said short wire so that the wire could be used for the said purpose alleged.

"Plaintiff alleges that there was a small metal bulb or cylinder on the end of said wire and while engaged in preparing said wire the said bulb exploded.

"Plaintiff alleges that he afterwards learned that this bulb was some sort of percussion cap with tremendous explosive power but did not know of it at the time he was at work and the same was negligently given to him as a part of the tools and materials with which he was supplied for his said work.

"Plaintiff alleges that as a result of said explosion he was permanently blinded in both eyes and has ben informed by his physician that both his eyes will have to be removed. (Rec., p. 4.)

II.

That service of summons was duly made February 12, 1920, in accordance with the provisions of General Order No. 50-A, on E. E. Calvin, an operating official, operating for the Director General the railroad of Union Pacific Railroad Company (Rec., p. 7).

III.

That while the respondent did not allege in his petition either where the pretended cause of action arose, or where he resided at the time of the accrual thereof, the undisputed fact is, as disclosed by the record, a certified copy of which is presented herewith, that the pretended cause of action arose in Council Bluffs, Iowa, and that the respondent was a citizen and resident of that place when he was injured, when he commenced this action, and when it was tried.

IV.

That the Director General appeared specially and challenged the jurisdiction of the court, invoking the protection of General Order No. 18-B, which provides "that all suits against the Director General of Railroads, as authorized by General Order No. 50-A, must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action, or in the county or district where the cause of action arose, * * *" and moved the court to quash the summons because the action, for the reasons above stated, was wrongfully brought in the District Court of Douglas County, Nebraska, and it was without jurisdiction. The motion was overruled (Rec., p. 9).

In due time the Director General filed his answer to the respondent's amended petition, and in accordance with the practice settled by many decisions of the Supreme Court of Nebraska, set up want of jurisdiction along with his other defenses (Rec., p. 28).

V.

That the case was tried twice. The first trial resulted in a directed verdict for the defendant. The plaintiff appealed to the Supreme Court and it reversed the case and ordered a new trial. (For copy of the opinion, see page 322 of the record.) The Supreme Court dodged the jurisdictional question on the first appeal and refused to consider it, assigning as its reason therefor the failure of the Director General to file a cross-appeal from the judgment in his favor. (The Nebraska statute only authorizes appeals from a final order, and it is not contended that an appeal should have been prosecuted from the order overruling the Director General's special appearance, because this was not a final order.) There was no final order against him and he had nothing to appeal from, either directly or by cross-appeal.

On the second appeal the court held that the District Court of Douglas County had jurisdiction because the defendant filed the special appearance and motion to quash the summons hereinbefore referred to, and which, omitting the caption and exhibits, reads as follows:

> "Comes now said defendant, Walker D. Hines, Director General of Railroads, and appearing specially and for the purpose only of objecting to the jurisdiction of the court over the person of the defendant and over the subject-matter of this action, moves the court to quash the summons herein, and as grounds therefor alleges:
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> "That General Orders Nos. 50, 50-A, 18, 18-A and 18-B, issued by the Director General of Railroads, copies of which are hereto attached, marked Exhibits 'A,' 'B,' 'C,' 'D,' and 'E,' respectively, and made a part hereof, provide that all suits against the Director General of Railroads as authorized by General Order No. 50-A, must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action, or in the county or district where the cause of action arose; defendant further alleges that the plaintiff, at the time of the accrual of his pretended cause of action, did not reside in Douglas County, Nebraska; that the pretended cause of action set forth in his petition did not arise in said county and state; and that this action is wrongfully brought therein" (Rec., p. 9).

The court states in its opinion, referring to the filing of the above motion, that "It must be conceded that, unless the defendant has brought himself under the jurisdiction of the court by a general appearance, the court did not acquire jurisdiction" (Rec., p. 308). And it is further stated in the opinion that by *filing the above motion and special appearance,* the "Defendant called for a determination as to whether the court had jurisdiction of the subject-matter of the action, which required an examination of the petition and a ruling as to the nature of the action. He thereby

called for the exercise of a judicial function not relating to jurisdiction over his person. He must necessarily be before the court in order that this might be done" (Rec., p. 307).

Paragraph 2 of the syllabus, which under the Nebraska practice is the law of the case, reads:

> "An action for damages against the Director General of Railroads under the Federal Employers' Liability Act is both local and transitory under General Order No. 18-A, and the District Courts of this state have jurisdiction over the subject-matter of such an action. Where the Director General specially appears to object to the jurisdiction of the court over his person, and at the same time challenges the jurisdiction of the court over the subject-matter of the controversy, as to which the motion is not well founded, this is a voluntary appearance equivalent to the service of summons, and gives the court jurisdiction over the person of such officer" (Rec., p. 298).

VI.

That when the case was called for trial the second time, May 31, 1922, the plaintiff moved the court to substitute James C. Davis, as Agent, as defendant in lieu of Walker D. Hines, Director General of Railroads, against whom the suit was originally brought. This was the first time that the plaintiff asked for substitution.

When the case was commenced, January 9, 1920, Walker D. Hines was Director General of Railroads. March 11, 1920, Walker D. Hines was designated as Federal Agent in accordance with subdivision (a) of Section 206 of the Transportation Act. May 14, 1920, Walker D. Hines, as such Agent, was succeeded by John Barton Payne, who in turn was succeeded March 6, 1921, by James C. Davis.

The first trial commenced May 26, 1920, at which time John Barton Payne was both Director General and Agent.

The case was decided in the Supreme Court of Nebraska the first time March 28, 1922, at which time James C. Davis was Agent.

The defendant objected to such substitution on the ground that the court had no jurisdiction of the action, and on the further ground that the substitution was not made within the time prescribed by Section 1594, Volume 3, U. S. Compiled Statutes 1916, 30 Stat. L. 822, which limits the time within which such substitutions can be made to 12 months. The court overruled the objection and the substitution was made (Rec., p. 73, par. 8).

We have not overlooked the Winslow Bill, which authorizes and validates substitutions after 12 months in cases *properly commenced.* The present case, however, was commenced contrary to the provisions of General Order 18-B, and was, therefore, not *properly commenced.* Since it was not properly commenced and was not properly pending when the Winslow Bill passed, substitution is not authorized by that Act.

Although the question as to whether or not the substitution was properly made was duly raised by the record and presented to the Supreme Court of Nebraska, it ignored the question and made no mention of it in its opinion; but since it affirmed the judgment of the District Court, its decision amounts to a holding that the substitution was properly made.

VII.

That the record shows that John O'Hara, the respondent, was employed by the defendant at a gantry, or traveling crane, pictures of which are attached to the record as Exhibits 4 and 5, pages 98 and 99, in Council Bluffs, Iowa, on the day of the accident; that the gantry was used to transfer heavy shipments, moving in interstate commerce,

from bad order to good order cars, but the record does not show that it was used exclusively for such purpose; that there were five men employed to operate the gantry, viz.: John Turner, who was the foreman; John O'Hara, the plaintiff; his uncle, Ed. O'Hara; his cousin, Francis O'Hara, and Charlie Berg. The gantry was provided with a supply of ropes and chains which were required to fasten the material to be moved to the hoist of the gantry. Foreman Turner operated the crane; the other men fastened and unfastened the chains or ropes to the shipments.

The evening prior to the accident a carload of steel, moving in interstate commerce, was set at the gantry to be transferred into another car. The men commenced work on the morning of the accident at eight o'clock and finished transferring this car of steel at 10:30 or 11:00 o'clock. No other cars had been set at the gantry and the men had no other duties to perform until this was done, except to hold themselves in readiness to transfer another car when set to the gantry by the switch crew.

The foreman knew that he would be called upon to transfer a car of telegraph poles, moving in interstate commerce, as soon as it was set at the gantry. He decided that while the men were waiting for the switch crew to set this car of poles, or some other car, he would make a cable sling out of a discarded cable which he had on hand; that when completetd the cable sling would be used in lieu of the ropes or chains in transferring the car of telegraph poles, as well as any other shipments of poles or lumber that he was called upon to transfer in the future. In other words, the foreman decided to make the cable sling for general use whenever occasion required. Two of the men procured the cable and cut off a piece about 30 feet in length; another man procured U-bolts. The ends of the cable were lapped and clamped together with these bolts. As the work progressed, the men observed that each end of the cable was jagged and, in order to protect their hands from injury,

they decided to wrap each of these ends with a cloth. No material had been specially provided for this purpose. The foreman gave a general order to procure cloth and to find a suitable piece of wire or string to bind it to the cable. E. W. O'Hara recalled seeing some wire in the coal car, from which they had transferred the steel, and went and got it. When he picked it up, he discovered that it consisted of two strands of small, insulated wire about five or six feet in length and that there was a small, metal cylinder attached thereto. Similar wires and cap are attached to the record as Exhibit 3 at page 121. When E. W. O'Hara got out of the coal car with the wire, Foreman Turner was coming down out of the crane. E. W. O'Hara held the wire up and said to Turner, "I guess this will be all right; he said, yes, if you have enough of it. I did not have very much of it. I says, it will have to be enough, that is all there is."

The foreman did not see the cap, and E. W. O'Hara was the only one who knew of its existence at that time. He attempted to sever the cap from the wires by twisting them and, failing in this, proceeded to cut off one of the strands near the cap by laying the strand across a piece of iron and striking it with a hammer. After he had done this, he took the cap with the other strand still attached thereto and hung it in the tool house. He then tied one cloth to the cable with the strand that he had cut off. After he finished this, he got the other strand and severed the cap from it in the manner above stated for the purpose of tying on the other cloth with the remaining wire. After he cut it off he was in the act of throwing the cap away when John O'Hara, the respondent, asked him what he had; to which he replied that he did not know, but it looked like a firecracker. Thereupon John O'Hara reached for the cap and E. W. O'Hara gave it to him. John O'Hara testified that there were still five or six inches of wire attached to the cap, or perhaps a little more, and that it was crumpled up; that he desired to straighten it for use in tying on the cloths, and that he held the cap in his left hand and pulled on the wires with his right hand to

straighten them; that the cap slipped out of his left hand, whipped around and struck the rail upon which he was sitting, and exploded, the discharge striking him full in the face and destroying his eyesight. He was not doing anything immediately prior to the time he took the cap and had not been looking for wire or assisting the other men in tying the cloths to the cable.

E. W. O'Hara, plaintiff's witness, testified—and his testimony is not disputed—that he did not intend to make any further use of the cap or the small portion of wire that was still attached thereto, and that the only reason he gave it to his nephew, the respondent, was because he asked him for it.

The undisputed evidence further shows that neither Foreman Turner, E. W. O'Hara, nor any of the other men had ever seen an electric blasting cap before, and that they did not know what it was and did not know that it was explosive or otherwise dangerous; that no explosives of any nature were used on the premises, and that none were used in that vicinity; that the gantry was equipped with the usual and ordinary appliances, and that it was not out of repair.

The sling was not completed prior to the accident. The foreman testified that he did not remember of using it at any time after the accident. The accident happened on Saturday. No cars were transferred after the accident on that day; none were transferred on the following day, which was Sunday. On Monday, the 15th, nine loads of steel were transferred, but the men did not use the cable in transferring them. The men started to transfer the car of telegraph poles on the 15th and finished it on the 16th. They did not use the cable in transferring the poles.

The plaintiff testified that he did not say anything to Foreman Turner about having the wire or cap; that he did not call Mr. Turner's attention to the fact that the wire had a cap or cylinder on the end of it, and that so far as he knew, Turner had no knowledge of this fact.

None of the men were watching the plaintiff when he received the cap and exploded it, except Charles Berg. He testified that he was about six feet from the respondent when the explosion occurred and was not doing anything; that he saw John O'Hara tapping on the rail with a hammer immediately before the explosion.

A number of experts of unquestioned ability and integrity testified on behalf of the defendant—and their testimony is undisputed—that electric blasting caps are used commercially by labors in mines and other places where blasting is done; that the caps will not explode from concussion unless they receive a blow of sufficient force to indent the shell; that in handling the caps the men whip them out and that they frequently strike stone and hard substances and that in all their experience they never knew of an explosion to occur from such a blow. The undisputed testimony of the experts further shows that they made tests to see how much of a blow the caps would stand without exploding. The testimony in regard to this is shown by Questions 1402 and following, page 242. See also the pictures attached to the record as Exhibits 14, 15, 16, 17 and 18, pages 244, 246 and 248. The expert witnesses further testified that, in their opinion, an electric blasting cap could not be exploded in the manner in which the plaintiff testified he exploded the one in question.

VIII.

That the Supreme Court of Nebraska erred in holding that the District Court of Douglas County had jurisdiction of this action.

The Supreme Court of Nebraska denied the Director General the benefit of General Order No. 18-B because he invoked its benefit. This amounts to holding the order void and its decision is in conflict with *Alabama, etc., Ry. Co. v. Journey*, 257 U. S. 111.

The question as to whether the court had jurisdiction does not depend upon whether or not the defendant appeared but upon the validity of Order 18-B.

This court is not bound by the state court's conclusion that the District Court of Douglas County had jurisdiction by reason of the filing of the motion and special appearance (See *Truax v. Corrigan*, 257 U. S. 312). In the case cited it is said:

> "Where the issue is whether a state statute, in its application to the facts specially alleged, and admitted by demurrer, violates the plaintiff's rights under the Constitution, this court must analyze the facts as averred and draw its own inferences as to their ultimate effect; it is not bound by the state court's conclusion in this regard, nor by that court's declaration that the statute is merely a rule of evidence."
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> "The jurisdiction of this court to review a judgment of a state court the effect of which is to deny a federal right, cannot be avoided by placing such judgment on non-federal grounds which are plainly untenable."
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> *Ward et al v. Board of County Commissioners of Love County, Oklahoma*, 253 U. S. 17.

The motion and special appearance did not amount to a general appearance and a waiver of the defendant's rights under General Order No. 18-B.

In paragraph 2 of the syllabus referred to above, the court says that the filing of this special appearance by the defendant "is a voluntary appearance *equivalent to the service of summons*, and gives jurisdiction over the person of the officer." Summons was duly served on the defendant in the manner prescribed by General Order No. 50-A before the special appearance was filed (Rec., p. 7). If, as the court says, the filing of the special appearance was equivalent to the service of summons, then the filing thereof did not add to the jurisdiction already acquired by the service of summons. The ruling of the court amounts to holding that the Director General cannot invoke the benefit of General Order 18-A in any case in which he has been duly and regularly served with summons in the manner specified by General Order No. 50-A.

"Whether an appearance is general or special is to be determined from the relief asked, and in reaching its conclusion the court will always look to matter of substance rather than form." 4 C. J. 1317; Bankers Life Insurance Co. v. Robbins, 59 Neb. 170.

Where the party alleges in his pleading that he appears specially for the purpose only of objecting to the jurisdiction of the court over his person or over the subject-matter of the action, or both, for certain assigned reasons the court looks to the "assigned reasons" to determine the true character of the pleading. In *Perrine v. Knights Templar's & Masons' Life Indemnity Co.*, 71 Neb. 267, cited approvingly by the Supreme Court of Nebraska in its opinion in this case, the court says (p. 273):

"The pleading filed in the court below states, 'Comes now specially above named defendant for the sole purpose of objecting to the jurisdiction of the court, and for no other purpose, and submits that the court is without jurisdiction of the subject-matter or of the person of the defendant for the following reasons'; whereupon the reasons are set forth, ten in number. We are now urged to disregard the challenge therein made to the jurisdiction of the subject-matter and treat it as surplusage. Our duty in this matter depends upon whether or not, under the 'reasons assigned,' there could have been anything considered by the court except the sole question of jurisdiction over the person of the defendant; not upon what was considered, but what might have been properly considered and determined by the court." * * * "With these considerations in view, we turn to the 'reasons assigned.'"

The court thereupon considers "assigned reasons" 5 and 7 and holds that they amount to a general appearance. The court did not detetrmine the question as to whether the appearance was general or special from the recitation in the formal part of the motion quoted above, but determined it solely from the "reasons assigned" therein. The question in that case was whether the summons had been properly served. This was not the question in the present case, as summons was duly served.

An examination of the special appearance and motion to quash in this case shows that the only "reason assigned" in support of the statement that the court has no jurisdiction over the person of the defendant or over the subject-matter of the action, is that by reason of the general orders of the Director General of Railroads this action is wrongfully brought in Douglas County, Nebraska. The motion simply invokes the protection of General Order 18-B. If by invoking the protection of the order the Director General waived it, he had as well not made it.

It further appears from the court's opinion and the authorities cited in support thereof that the court places this case in the class of cases where it is claimed that the court has acquired no jurisdiction over the person of the defendant by reason of defects or irregularities in the process, or service thereof, in which class of cases the rule of practice for the defendant is by special appearance to object to the jurisdiction, "and if he goes further and enters a general appearance, or invokes the powers of the court for any other purpose than quashing the pretended process, or service thereof, the defects are waived." The present case does not fall within this class, but falls within the class of cases "where, for some reason, the defendant is privileged from suit in the county where he is sued," notwithstanding he is properly served with summons. In this class of cases the defendant may, though he is not required so to do, appear specially and move to have the service quashed and, failing in this, he may again set up want of jurisdiction by answer along with any other defenses he may have. In the latter class of cases the fact that he files, or fails to file, a special appearance is not material.

IX.

That the Supreme Court of Nebraska erred in holding, as it did hold by affirming the case, that the plaintiff was at the time of his injury engaged in interstate transportation

or work so closely related to it as to be practically a part of it. This court has held that:

> "An employe of an interstate railway company who was engaged in the work of cutting a tunnel was not then employed in interstate commerce within the meaning of the Federal Employers' Liability Act * * * since the tunnel, being only partially bored, was not in use as an instrumentality of interstate commerce." (Raymond v. C., M. & St. P. Ry. Co., 243 U. S. 43.)

This court has also held that:

> "A night watchman in the employ of a railway company, injured while in the performance of his duty to guard tools and materials intended to be used in the construction of a new railway station and new tracks, was not then engaged in interstate commerce within the meaning of the Federal Employers' Liability Act * * *, although such station and tracks were designed for use, when finished, in interstate commerce." (New York Central R. Co. v. White, 243 U. S. 188.)

In the opinion in that case the court says:

> "Decedent's work bore no direct relation to interstate transportation, and had to do solely with construction work. * * *"

In the present case, if it be conceded that the plaintiff was acting within the course or scope of his employment when injured, he was simply engaged in assisting the other men to make a new appliance which, when completed, was to be used on the gantry. The appliance had not been completed before he was injured and was not used prior to the injury. The record affirmatively shows that it was not used for a number of days after the accident.

The decision is not in concord with the decisions of this Honorable Court upon this question.

X.

That the Supreme Court of Nebraska erred by holding, as it did hold by affirming the judgment of the District

Court, that there was sufficient evidence to warrant the trial court in submitting either or all of the allegations of negligence to the jury, which are:

(a) That the defendant neglected to provide wire, repairs, tools and machinery for the proper operation of the gantry.

(b) That the defendant failed to furnish wire upon said machinery or its appurtenances.

(c) "That the foreman directed his subordinates to procure wire to complete said work."

(d) That the foreman accepted the wire and "directed its use by his subordinates without carefully examining the same and neglecting to see and note its dangerous condition."

(e) That wire with the explosive cap attached thereto "was negligently given to him (plaintiff) as a part of the tools and materials with which he was supplied for his said work."

This Honorable Court has repeatedly held that in proceedings brought under the Federal Employers' Liability Act "rights and obligations depend upon it and applicable principles of common law as interpretetd and applied by the federal courts; and negligence is essential to recovery."

It was not negligence, under the circumstances disclosed by the record, to fail "to provide wire" with which to tie the cloth to the cable. It was not negligence for the foreman to tell "his subordinates to provide wire for such work." It was not negligence for the foreman to direct the use of the wire found "without carefully examining the same," and it was not negligence on the part of the foreman to fail "to see and note its dangerous condition."

It is settled law that there was no duty on the part of the employer to inspect a piece of wire which was to be used to tie a cloth to a cable.

It is obvious that such an accident as occurred could not have been anticipated from the failure to have a supply of

wire on hand, and it is also obvious that the foreman could not anticipate that any of the men would be hurt when he told them to get wire and tie the cloth around the cable ends.

> "Negligence consists in a failure to provide against the ordinary occurrences of life, and the fact that the provision made is insufficient as against an event such as may happen once in a lifetime, or perhaps twice in a century, does not make out a case of negligence upon which an action in damage will lie." (22 L. R. A. (n. s.) 917, 920.)

> "To warrant a finding that a negligent act or omission, not amounting to a wanton wrong, is the proximate cause of an injury, it must appear that the injury was a natural or probable consequence thereof and that it ought to have been foreseen in the light of attending circumstances." (78 Neb. 155.)

As above stated, all of the above allegations of negligence were submitted to the jury, and we submit that this was error.

The manner in which the plaintiff came into possession of the cap disproves his contention that it was negligently furnished him for his use in connection with the work which the men were doing. The fact that the plaintiff asked E. W. O'Hara what he had proves that his curiosity was aroused when he saw the cap, and that he wanted it and not the fragment of wire attached thereto. E. W. O'Hara, who alone was procuring the wire and tying on the cloth, had cut off such wire as he needed from the cap, and neither he nor any of the other men had any use for the short piece of wire still attached thereto. E. W. O'Hara intended to throw the cap and the wire attached thereto away, and would have done so except for the fact that the plaintiff asked him to give it to him. This shows that E. W. O'Hara was not acting in the scope or course of his employment when he gave the cap to the plaintiff, and that the plaintiff was not acting within the scope or course of his employment when he asked for and received it.

The record also discloses without contradiction that E. W. O'Hara, the uncle, was not acting within the scope or course of his employment when he gave the cap to the plaintiff. E. W. O'Hara was in the act of throwing the cap away when the plaintiff asked him for it. He did not give the plaintiff the cap to be used by him in the promotion of the defendant's work. E. W. O'Hara did not have the slightest suspicion, or grounds for suspicion, that the plaintiff would attempt to straighten the wire still attached to the cap, or that if he did he would get hurt in doing so. The evidence shows that even an expert would not have anticipated such result. When the plaintiff requested E. W. O'Hara to give him the cap, the latter had no reason to suppose that the former wanted wire to use in the promotion of the defendant's work. The proof, therefore, does not show that the defendant furnished the wire or cap to the plaintiff to be used by him in connection with the work, but on the contrary, shows that he did not.

No instructions had been given to the plaintiff by the foreman, or any one else, to straighten the wire or to detach it from the cap. When the plaintiff undertook to do this, he was not complying with any instructions of the foreman. He did not direct the foreman's attention to the fact that there was a cap attached to the wire. There were no explosives used in or about the premises, and the foreman did not have the slightest reason to anticipate injury to any one in carrying out his orders. Nothing short of prophetic vision could have anticipated the accident of which the plaintiff complains.

The decision of the Supreme Court is at variance with the decisions of this court upon the question as to what constitutes actionable negligence.

XI.

The Supreme Court of Nebraska erred in deciding as it did by affirming the judgment, that the plaintiff did not assume the risk. This Honorable Court has decided that

"Under the Federal Employers' Liability Act, except in the cases specified in Section 4, the employee assumes extraordinary risks incident to his employment, and risks due to negligence of employer and fellow-employees, when obvious or fully known and appreciated by him."

The plaintiff testified that he knew that there was no wire in the tool house and that he knew "the foreman directed his subordinates to procure wire." The plaintiff knew as much concerning the dangers, if any, incident to carrying out the above order as the foreman or any of the other men. There was no more reason why the foreman should anticipate that an explosive cap would be found and that the plaintiff would explode it and destroy his eyesight, than there was that the plaintiff himself should anticipate such result. He, therefore, assumed the risk incident to the failure to have wire in the tool house and incident to the carrying out of the above order.

The plaintiff and E. W. O'Hara were the only persons who knew of the existence of the cap before the explosion. They testified that they did not know what it was, or that it was explosive or otherwise dangerous, until the cap exploded. E. W. O'Hara, plaintiff's witness, testified that he told the plaintiff that he did not know what the cap was, but that it looked to him like a fire cracker. He thereby imparted all of the knowledge which he had concerning the cap to the plaintiff. The plaintiff, of course, knew that the cap was not wire. He had not been instructed to straighten wire or to sever it from a cap. There was no reason for the foreman to anticipate that the plaintiff would try to straighten wire which was attached to an explosive cap. It the defendant can be charged with negligence under such circumstances, which we deny, then the plaintiff, by the same process of reasoning, must be charged with assumption of risk.

XII.

That your petitioner is advised that the jurisdictional question has not been passed upon by your Honorable Court; that until it is passed upon, there will be a confusion and uncertainty with regard to the application of the federal law to the orders of the Director General and doubt concerning the rights and obligations thereunder which ought not to exist.

WHEREFORE, your petitioner prays that a writ of certiorari may issue out of and under the seal of this Court, directed to the Supreme Court of Nebraska, commanding that court to certify the case to this Court for review and determination, as provided in the Act of Congress, known as the Judicial Code, or that your petitioner may have such other and further relief in the premises as to this Court may seem appropriate and in conformity with said Act.

JAMES C. DAVIS,
Agent of the President under Section 206 of the Transportation Act, 1920.
Petitioner.

A. A. MCLAUGHLIN,
N. H. LOOMIS,
EDSON RICH,
C. A. MAGAW,
Counsel for Petitioner.

State of Nebraska }
} ss.
County of Douglas }

C. A. Magaw, being duly sworn, says that he is one of the attorneys for James C. Davis, Agent of the President, under Section 206 of the Transportation Act, 1920, the petitioner named in the foregoing petition; that he has read the same and knows the contents thereof, and that the facts therein stated are true to the best of his knowledge, information and belief.

C. A. MAGAW.

Subscribed and sworn to before me this third day of May, 1923.

MABEL A. BROWN,
Notary Public.

My commission expires September 27, 1924.